

1-1971

A Private Right of Action under Section Five of the Federal Trade Commission Act

Allan Bruce Currie

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Allan Bruce Currie, *A Private Right of Action under Section Five of the Federal Trade Commission Act*, 22 HASTINGS L.J. 1268 (1971).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol22/iss5/7

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

A PRIVATE RIGHT OF ACTION UNDER SECTION FIVE OF THE FEDERAL TRADE COMMISSION ACT

Section 5 of the Federal Trade Commission Act (FTCA) states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."¹ Since 1926 federal courts have held that there is no private right of action under this section, declaring that only the Federal Trade Commission (FTC) could institute an action for its violation.² The FTCA created the FTC as an administrative body designed to prevent persons, partnerships or corporations from engaging in unfair methods of competition.³ However, Congress nowhere specified that it was granting *exclusive* jurisdiction to the FTC to enforce the provisions of the FTCA.⁴ Rather, it limited the FTC's authority to the institution of actions when it was in the "interest of the public."⁵

Since the enactment of the original FTCA in 1914,⁶ and the passage of the Wheeler-Lea Amendment in 1938,⁷ there has been an increased awareness of the plight of the consumer.⁸ Yet at the present time there is still no uniform law of unfair competition or deceptive trade practices which permits consumers to bring an action for private relief in the federal courts. A construction of section 5 to give private parties this remedy would enable them to protect themselves in today's marketplace. The doctrine of *caveat emptor*, so prevalent at the time of the

1. 15 U.S.C. § 45(a)(1) (1964).

2. *Moore v. New York Cotton Exchange*, 270 U.S. 593, 603 (1926).

3. 15 U.S.C. § 45(a)(6) (1964).

4. See Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987, 988 (1949) [hereinafter cited as Bunn]. Professor Bunn's argument that the FTCA did not give the FTC exclusive jurisdiction of cases arising under its terms is described as persuasive in *Radio Shack Corp. v. Radio Shack*, 180 F.2d 200, 202 n.1 (7th Cir. 1950).

5. 15 U.S.C. § 45(b) (1964).

6. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-58 (1964)).

7. Ch. 601, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1964)).

8. See generally D. CAPLOVITZ, *THE POOR PAY MORE* (1963); J. CARPER & W. MAGNUSON, *THE DARK SIDE OF THE MARKETPLACE* (1968); J. GRAHAM, *ENEMIES OF THE POOR* (1970); S. MARGOLIUS, *THE INNOCENT CONSUMERS V. THE EXPLOITERS* (1967); MacIntyre & von Brand, *Unfair Methods of Competition As An Evolving Concept—Prelude To Consumerism*, 44 ST. JOHN'S L. REV. 597 (1969); Comment, *The Consumer Fraud Information Gap*, 49 ORE. L. REV. 421 (1969); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

passage of the original FTCA,⁹ can no longer be the credo of the federal courts if they are to play a meaningful role in giving vitally needed protection to the consumer. This Note will examine the necessity for implying a private right of action under section 5 and will argue that all previous cases holding to the contrary are no longer controlling.

An Analysis of Previous Cases

The question of a private right of action under section 5 has been litigated frequently. Since the enactment of the original FTCA almost 60 years ago, business competitors have sought to bring actions under section 5 to prevent unfair competition among themselves, but courts have been unanimous in holding that Congress did not intend to afford these litigants any private relief. However, since the passage of the Wheeler-Lea Amendment,¹⁰ which broadened the coverage of the FTCA to include consumers, the federal courts have never had to decide whether an individual *consumer* could seek private relief under section 5. In all of the cases discussed below, the question for decision was whether a *competitor* could sue under the FTCA.

In *Moore v. New York Cotton Exchange*,¹¹ a 1926 case that is most frequently cited for the proposition that section 5 affords no private relief, the Court dismissed the question of a private action in these few words:

There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission.¹²

The Court cited no authority to support this holding: it simply gave a literal—and narrow—construction to the 1914 Act. However, the right to sue under section 5 was really not necessary, because the federal courts had developed a federal common law¹³ of unfair competition under which individuals had a private right of action.¹⁴ Because most

9. E. COX, R. FELLMETH & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION 5* (1969) [hereinafter cited as *NADER REPORT*]; see Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965) where he quotes Attorney General Louis J. Lefkowitz: "We believe that the old axiom of caveat emptor must be restated to say: let the merchant take the responsibility to explain his product in the frankest terms and deal openly and honestly with the consumer."

10. Ch. 601, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1964)).

11. 270 U.S. 593 (1926).

12. *Id.* at 603.

13. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which permitted the federal courts to develop their own common law. This case, however, was overruled by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

14. See Bunn, *supra* note 4, at 990.

unfair competition cases involved diversity of citizenship among the parties,¹⁵ they were usually brought in the federal courts.¹⁶ Thus, the federal common law was adequate to dispose of these suits. At the time *Moore* was decided, there was no need for a further private right of action under section 5.

Moore and subsequent cases denying private relief under section 5 were actions to prevent unfair methods of competition among businesses. In all cases, the courts applied the *Moore* construction of the FTCA. In *National Fruit Product Co. v. Dwinell-Wright Co.*,¹⁷ for example, the court stated: "I believe it cannot fairly be said that Congress [in passing section 5] went further and . . . authorized federal courts to develop a rounded federal common law of unfair competition."¹⁸ The court added that it is for the legislature, not for the judiciary, to develop a federal law of unfair competition.¹⁹ *Samson Crane Co. v. Union National Sales, Inc.*,²⁰ relying on *Moore* and *National Fruit Product Co.*, held: "The Federal Trade Commission Act while declaring certain acts and practices unlawful, gives no right of action to private litigants based on such unlawful acts."²¹

Nor have the federal courts changed their interpretation of section 5 in recent cases. In two unfair competition actions brought by competing businesses, *Smith-Victor Corp. v. Sylvania Electric Products, Inc.*²² and *La Salle Street Press, Inc. v. McCormick and Henderson, Inc.*,²³ the court dismissed the claim of private relief by saying that the FTC had original jurisdiction. For this proposition the courts relied on *Moore* and *Samson Crane*.

Thus, all cases denying relief stem from *Moore v. New York Cotton Exchange*,²⁴ which offered no rationale for its holding. Moreover,

15. Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1299 (1940) [hereinafter cited as Chafee].

16. *Id.*; Diamond, *The Proposed Federal Unfair Commercial Activities Act*, 23 OHIO ST. L.J. 110, 113 (1962) [hereinafter cited as Diamond]; Note, *The Choice of Law in Multistate Unfair Competition: A Legal-Industrial Enigma*, 60 HARV. L. REV. 1315, 1316 (1947).

17. 47 F. Supp. 499 (D. Mass. 1942).

18. *Id.* at 504.

19. *Id.* Professor Charles Bunn advanced the proposition that section 5 was in fact a national law of unfair competition. Bunn, *supra* note 4, at 988-89. Judge Henry Friendly found Bunn's thesis to be intriguing and of considerable appeal. He suggested that it had not caught on "perhaps for no better reason than that no one had thought of it for thirty years." Friendly, *In Praise of Erie and the New Federal Common Law*, 19 RECORD OF N.Y.C.B.A. 64, 87 (1964).

20. 87 F. Supp. 218 (D. Mass. 1949).

21. *Id.* at 221.

22. 242 F. Supp. 302, 306 (N.D. Ill. 1965).

23. 293 F. Supp. 1004, 1006 (N.D. Ill. 1968).

24. 270 U.S. 593 (1926).

all actions were for unfair methods of competition among competing businesses. A private consumer's claim for relief under section 5 after the passage of the Wheeler-Lea Amendment²⁵ has never been litigated.

In 1938 Congress passed the Wheeler-Lea Amendment to the FTCA to protect the consuming public from unfair practices. Thus, it broadened the 1914 Act which had protected honest businessmen from unlawful competitive practices.²⁶ The 1938 Amendment added the words: "unfair or deceptive acts or practices in commerce [are unlawful]"²⁷ to the 1914 Act. Failure of the new phrase to use the word "competition" implied that Congress intended to give protection to the consumer,²⁸ thus placing him on a par with the businessman from the standpoint of protection from deceptive practices.²⁹

A consumer would be seeking relief under that provision of section 5 which prohibits "unfair or deceptive acts or practices." Therefore, the unfair competition cases would not be controlling. Courts would have to consider a consumer's action for unfair trade practices in light of congressional intent in passing the Wheeler-Lea Amendment to protect consumers. Furthermore, the courts, which are policy-making institutions, should also take judicial notice of the consumer's present, largely defenseless, position.³⁰

It is at least arguable that the federal courts could construe the FTCA in the following manner: The FTCA makes unlawful unfair methods of competition and unfair or deceptive acts or practices. The FTC may bring an action only when it is in the public interest to do so, but the consumer may *also* take advantage of its protection to bring an action for private relief.

Necessity of a Private Right of Action Under Section 5 of the Federal Trade Commission Act

At the present time consumer protection is limited largely to the FTC's enforcement of section 5 and available remedies under state law. Both, however, offer only limited and, in most cases, inadequate protection.

25. Ch. 601, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1) (1964)).

26. 83 CONG. REC. 391-92 (1947) (remarks of Senator Lea). See *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953).

27. 15 U.S.C. § 45(a)(1) (1964).

28. Note, *The Federal Trade Commission Act of 1938*, 39 COLUM. L. REV. 259, 262 (1939); Note, *The Consumer and Federal Regulation of Advertising*, 53 HARV. L. REV. 828, 837 (1940).

29. See MacIntyre, *supra* note 8, at 612; see also Charlton & Fawcett, *The FTC and False Advertising*, 17 KAN. L. REV. 599, 608 (1969).

30. See text accompanying notes 31-103 *infra*.

A. Available State Remedies

Today most actions for unfair methods of competition and deceptive trade practices are brought in federal court because of the diversity of citizenship of the parties affected.³¹ Nonetheless, federal courts, under the compulsion of *Erie Railroad Co. v. Tompkins*,³² must apply state substantive law in diversity actions because of the lack of an applicable federal statute.³³

1. State Common Law Remedies

The common law of the various states is presently not able to protect consumers from unfair or deceptive acts or practices in commerce. Since prior to *Erie* most cases were litigated in federal courts which applied federal common law, many of the states never had the opportunity to develop their own common law of deceptive trade practices. The available case law which the federal courts had to apply after *Erie* was very old³⁴ and of doubtful present applicability.³⁵ In fact, decisional law was usually lacking in states without large commercial centers.³⁶ Advocating private legal recourse for the consumer, the *Harvard Journal of Legislation* said that existing state common law

may not provide a private remedy where there is no private right of action for unfair and deceptive trade practices. While there are possible legal theories for dealing with fraud and misrepresentation on the part of sellers, they may be unrealistic when applied to unsophisticated consumers, and even where they are theoretically available, without legislation, they require the admittedly slow evolution of the common law.³⁷

The primary remedy available to the consumer under the common law is an action for deceit. However, the plaintiff must prove that (1) he has reasonably relied on³⁸ the (2) misrepresentation³⁹ (3) of

31. Diamond, *supra* note 16, at 113; Note, *supra* note 16, at 1316.

32. 304 U.S. 64 (1938).

33. *Id.* at 71-80; see Chafee, *supra* note 15, at 1299; Diamond, *supra* note 16, at 112; Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trademarks and Unfair Competition*, 42 COLUM. L. REV. 955 (1942); Note, *supra* note 16, at 1316.

34. Diamond, *supra* note 16, at 113.

35. Note, *supra* note 16, at 1316-17.

36. See Diggins, *Federal and State Regulation of Trade-Marks*, 14 LAW & CONTEMP. PROB. 200, 201-02 (1949); Dole, *The Uniform Deceptive Trade Practices Act: Another Step Toward a National Law of Unfair Trade Practices*, 51 MINN. L. REV. 1005, 1007 (1967) [hereinafter cited as Dole].

37. *An Act To Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEGIS. 122, 147 (1969); see Comment, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 897 n.4 (1970).

38. Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 712 (1967).

39. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 700 (3d ed. 1964) [hereinafter cited as PROSSER]; Note, *supra* note 38, at 712.

a fact (as contrasted with a statement of opinion)⁴⁰ that has been knowingly made by a merchant⁴¹ (5) with intent to deceive⁴² (6) and has resulted in harm to the consumer.⁴³

The difficulties encountered in proving each of these elements have proven to be an almost insurmountable obstacle for the average consumer.⁴⁴ This hurdle is compounded by the necessity of proving legal damages.⁴⁵ Moreover, if damages are not foreseeable,⁴⁶ recovery will be denied. Finally, the majority of states require proof of legal malice (an aggravated form of conduct) for recovery of exemplary damages.⁴⁷

2. Existing State Consumer Legislation

Although a few states have modeled their consumer legislation after section 5 of the FTCA,⁴⁸ most consumer protection statutes are not sufficiently comprehensive to provide complete protection,⁴⁹ especially in light of the extensive range of deceptive trade practices that

40. Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 23 (1929) [hereinafter cited as Handler]; see PROSSER at 700.

41. PROSSER at 700; Note, *supra* note 38, at 712; see Note, *Can the Kentucky Consumer Ever Forget Caveat Emptor and Find True Happiness?* 58 KY. L.J. 325, 345 (1970).

42. PROSSER at 700; Note, *supra* note 38, at 712.

43. PROSSER at 700; Handler, *supra* note 40, at 23.

44. Note, *Fair Packaging, Fair Labeling and the Federal Trade Commission: An Exercise in Consumer Protection*, 1 GA. L. REV. 525, 526 (1967); Note, *supra* note 38, at 713; see Dole, *supra* note 36, at 1015; Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 LAW & CONTEMP. PROB. 91 (1939); Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 U. SAN DIEGO L. REV. 47, 48 (1971); Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 321 (1968); see also Handler, *supra* note 40, at 27 where he says: "It is apparent that the traditional actions of deceit and warranty as developed by the courts can be of little utility in a campaign against false advertising. There are not many signs at present that the common law in this field possesses sufficient capacity for growth to originate a new cause of action on the cases for damages flowing from false statements contained in advertising."

45. PROSSER at 747-48; see Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy*, 1968 DUKE L.J. 831, 862.

46. PROSSER at 748.

47. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307, 321 (1969).

48. HAWAII REV. STATS. § 480-2 (1968); MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (Supp. 1971); N.C. GEN. STAT. § 75-1.1(a) (Supp. 1969); VT. STAT. ANN. tit. 9, § 2453(a) (Supp. 1970); WASH. REV. CODE § 19.86.020 (Supp. 1965).

49. Morse, *A Consumer's View of FTC Regulation of Advertising*, 17 KAN. L. REV. 639, 649 (1969), where the author states: "To date, too many states remain without adequate consumer protection laws. . . . How rapidly states will develop a positive commitment to the consumer remains to be seen"; Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559,

has arisen in recent years.⁵⁰ The following survey is not exhaustive; it is intended only to suggest that consumer legislation is in its infancy, and that the protection it affords is haphazard at best.

Although numerous states have passed consumer legislation in the past few years, most efforts to control deceptive trade practices are deficient. For example, many of the consumer protection statutes attempt to categorize the complex field of deceptive trade practices into narrow categories. Several states, including Connecticut, Georgia, Nebraska, New Mexico, Rhode Island and Texas have modeled their legislation after the *Uniform Deceptive Trade Practices Act*,⁵¹ which defines twelve categories of unfair or deceptive trade practices.⁵² Similarly, California's *Consumers Legal Remedies Act*,⁵³ operative January 1, 1971, attempts to classify deceptive trade practices in sixteen statutory provisions.⁵⁴ Thus, when a deceptive practice does not fall within a specific classification,⁵⁵ the consumer is left unprotected. The result is that the "legislation [is] of little avail against the imagination of the proverbial flim-flam man."⁵⁶

Nor do state laws passed on a piecemeal basis afford adequate protection. Oregon, for example,⁵⁷ has statutes covering interest and usury,⁵⁸ retail installment contracts,⁵⁹ fake sales,⁶⁰ and various specific deceptive trade practices.⁶¹ This fragmentary approach leaves the consumer virtually unprotected against practices that do not come within the often narrow provisions of the various statutes. States which lack a sufficiently broad statute—such as section 5⁶²—that covers the in-

610 (1968) says: "Too much of the recently enacted legislation appears to have been considered with only a partial picture of consumer injury problems." In regard to retail sales legislation, see Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 414 (1966).

50. Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. REV. 212, 240 (1969) [hereinafter cited as Starrs]. For an example of present state inadequacy in existing Kentucky consumer laws, see Note, *Can the Kentucky Consumer Ever Forget Caveat Emptor and Find True Happiness?* 58 KY. L.J. 325, 336-347 (1970).

51. Note, *supra* note 50, at 354 n.160; Note, *Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act,"* 22 S.C.L. REV. 767, 780 (1970).

52. Dole, *supra* note 36, at 1015-16; Note, *supra* note 50, at 354.

53. CAL. CIV. CODE §§ 1750-84. See also Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act*, 2 PAC. L.J. 1 (1970).

54. CAL. CIV. CODE §§ 1770(a)-(p).

55. Note, *supra* note 50, at 354-55.

56. *Id.* at 355.

57. See Comment, *supra* note 8, at 425-26.

58. ORE. REV. STAT. §§ 83.010-.190 (1964).

59. *Id.* §§ 83.510-.680 (1969).

60. *Id.* §§ 646.210-.230.

61. *Id.* §§ 646.605-.990.

62. In *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the Court said

finite variety of deceptive trade practices cannot offer meaningful protection to its citizens.

At least ten states—Arizona, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, New Jersey, New York and North Dakota—have adopted the *Consumer Fraud Law*.⁶³ Although this law contains sufficiently broad coverage for the consumer,⁶⁴ it allows only the state attorney general to bring an action,⁶⁵ thus denying to injured consumers any private right of action. *The Uniform Deceptive Trade Practices Act*, while allowing private litigants injunctive relief, also makes no provision for recovery of damages by injured consumers.⁶⁶

To summarize, most state statutes provide partial coverage at best. Those states with comprehensive legislation often do not permit their citizens to sue for private relief. The result is that, on a nationwide basis, the consumer often has a right without a remedy—or no right at all.

3. State Agencies

State institutions, such as the offices of consumer counsel and special agencies under the states' attorneys general have also proven to be generally ineffective. Although over one half of the states have special offices for consumer protection,⁶⁷ "some municipalities and states have no consumer protection program, and others have consumer fraud programs in name only."⁶⁸

One author has suggested that courts could take judicial notice of the inability of the states' attorneys general to cope with the ever-

that "the proscriptions in § 5 are flexible," and that section 5 is "to be defined with particularity by the myriad of cases from the field of business," quoting from *FTC v. Motion Picture Advertising Co.*, 344 U.S. 392, 394 (1952). In Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307, 308 (1969), the author discusses the enactment of a statute modeled after section 5 and says the precedent to be followed is to implement "the flexible consumer-oriented principles used in the interpretation of section 5(a)(1) of the Federal Trade Commission Act."

63. Note, *supra* note 50, at 355 n.164.

64. Note, *supra* note 50, at 355; see Note, *Consumer Protection Under the Iowa Consumer Fraud Act*, 54 IOWA L. REV. 319, 325 (1968).

65. Note, *Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act"*, 22 S.C.L. REV. 767, 780 (1970). For example, IOWA CODE § 713.24 (3) (1966) states that the remedies of the *Consumer Fraud Act* are available "[w]hen it appears to the attorney general that person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this section. . . ."

66. Dole, *supra* note 36, at 1017.

67. *An Act to Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEGIS. 122, 124 (1969).

68. REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 52 (1969).

increasing evidence of fraud in the consumer field.⁶⁹ In Kentucky, for example, the attorney general has authority to enforce only three statutes that directly protect consumers: (1) the *Advertising and Wholesale Act*; (2) the *Going Out of Business Act*, and (3) the *Chain Merchandising Act*.⁷⁰ If a consumer seeks redress for a violation of any other law, "the Attorney General's Office can only offer its services in mediation and hope for voluntary cooperation by the respondent company."⁷¹

The Better Business Bureau, where most knowledgeable consumers first bring their complaints,⁷² is also unable to deal adequately with many of their problems.⁷³ Indeed, it has even helped defeat consumer protection legislation in the name of "voluntary self-regulations" for businessmen.⁷⁴ Mrs. Sylvia Siegal, executive director of the Association of California Consumers, has said that the Better Business Bureau "can't be expected to do a complete job. It essentially is set up to protect business."⁷⁵ A critic in the San Francisco office of the Federal Trade Commission concluded: "The Better Business Bureau in concept and execution has one basic flaw: it is set up to serve the needs of business, not the needs of the consumer."⁷⁶

B. The Federal Trade Commission

At present, only the FTC can institute proceedings under section 5 of the FTCA. Major criticism of the FTC has been both widespread and continuous, from Henderson's treatise in 1924⁷⁷ to the ABA's Commission studying the FTC in 1969.⁷⁸ Richard Posner, a former staff attorney of the FTC and member of the ABA Commission in-

69. Starrs, *supra* note 50, at 226.

70. Note, *supra* note 50, at 340.

71. *Id.* at 341.

72. Caplovitz, *Consumer Problems*, 23 LEGAL AID BRIEFCASE, 143, 147 (1965).

73. Comment, *supra* note 49, at 404-09; see Note, *supra* note 50, at 340.

74. Comment, *supra* note 49, at 409.

75. Streeter, *Better Business Bureau Is Busy*, San Francisco Sunday Examiner & Chronicle, Feb. 14, 1971, § B, at 13, col. 1.

76. *Id.* at col. 2.

77. G. HENDERSON, THE FEDERAL TRADE COMMISSION (1924) [hereinafter cited as HENDERSON].

78. REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter cited as ABA REPORT]. See also COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE ON REGULATORY COMMISSIONS, app. N (1949) [hereinafter cited as HOOVER COMMISSION REPORT]; NADER REPORT, *supra* note 9; Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383 (1964); Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A.J. 1045 (1970) [hereinafter cited as Elman]; Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969) [hereinafter cited as Posner].

vestigating the FTC, summarized these critical works: "What is remarkable about these studies, which span a period of 45 years, is the sameness of their conclusions."⁷⁹ He went on to assert that the FTC was generally

rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent. And—the persistence of these criticisms would seem to indicate—largely impervious to criticism.⁸⁰

The chief criticism of the FTC is that it has failed to provide effective planning and coordination within the agency.⁸¹ The result is a lack of discrimination in the selection of cases that involve questions of public importance⁸² and an inordinant amount of time spent on trivial matters.⁸³ Lack of planning, moreover, has produced an overcrowded FTC docket. Thus months and even years may pass between the filing of a complaint and the rendition of an effective decision.⁸⁴ This general lack of efficiency has been traced to the failure of officials to provide effective leadership,⁸⁵ which failure has also caused a downward trend in activities while budget and staff have increased.⁸⁶

It has also been charged that the FTC has become an inactive agency⁸⁷ with little actual contact with the consumer.⁸⁸ Indeed, because of the deficiencies in its methods of gathering data,⁸⁹ it is doubtful that the FTC is really aware of the problems of the consumer. The commission relies largely on consumer's complaints for in-

79. Posner, *supra* note 78, at 47.

80. *Id.*

81. ABA REPORT, *supra* note 78, at 12.

82. HOOVER COMMISSION REPORT, *supra* note 78, at 128; NADER REPORT, *supra* note 9, at 43-49.

83. HENDERSON, *supra* note 77, at 337; HOOVER COMMISSION REPORT, *supra* note 78, at 128; ABA REPORT, *supra* note 78, at 9; NADER REPORT, *supra* note 9, at 165; Auerbach, *supra* note 78, at 393.

84. HENDERSON, *supra* note 77, at 331; ABA REPORT, *supra* note 78, at 15. One example, although not altogether typical, is the *Holland Furnace* case where the initial complaint was in the early 1930's and the final order was not upheld until 1965. *In re Holland Furnace Co.*, 341 F.2d 548 (7th Cir. 1965); see Comment, *supra* note 49, at 444-45. See also Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548 (1964).

85. ABA REPORT, *supra* note 78, at 13. Philip Elman, former FTC Commissioner, has said of FTC Commissioners: "As long as I can remember, Presidents have said—and have been reminded by every new study and report—that revitalization of the agencies must begin by appointing better commissioners. . . . While the generally poor quality of agency appointment is indeed appalling, we should not be surprised that it is a fact and will probably continue to be, no matter who is president." Elman, *supra* note 78, at 1047.

86. ABA REPORT, *supra* note 78, at 1.

87. HOOVER COMMISSION REPORT, *supra* note 78, at 128.

88. NADER REPORT, *supra* note 9, at 121-22.

89. *Id.* at 164.

formation, but since it cannot recover monetary damages for aggrieved parties, they have little incentive to report unfair or deceptive acts or practices.⁹⁰ Because of the resulting diminution of complaints, the FTC has become "preoccupied with technical labeling and advertising of the most inconsequential sort."⁹¹

The FTC's lack of real power contributes to its inability to provide meaningful protection for the consumer. The FTC has

no power of its own to imprison, fine or assess or award damages. Its maximum authority is to issue an order to "cease and desist," and even this order can be appealed within 60 days after it is issued.⁹²

Also, even when the order to cease and desist is issued, the FTC permits the offender to comply voluntarily.⁹³ Occasionally, the commission will verify compliance by requiring the violators to file compliance reports. However, this report merely affirms that the offender has ceased the prohibited unfair trade practice and has taken measures to prevent recurrence.⁹⁴

Finally, much of the FTC's activity benefits corporations, trade associations or unions.⁹⁵ The ABA Commission has said: "Often the [FTC] has seemed more concerned with protecting competitors of an enterprise practicing deception rather than consumers."⁹⁶

It seems evident that basic, structural modifications are necessary to revitalize the FTC. As Philip Elman, a two-term member of the FTC, observed in 1970, the

chronic unresponsiveness and basic deficiencies in agency performance are largely rooted in its organic structure and will not be cured by minor or transient personnel or procedural improvements.⁹⁷

C. Need for Effective Protection

The obvious result of this ineffectiveness of the FTC and existing state remedies is quite apparent: those who are most in need of pro-

90. *Id.*; Posner, *supra* note 78, at 70, 88.

91. ABA REPORT, *supra* note 78, at 2.

92. FEDERAL TRADE COMMISSION, HERE IS YOUR FEDERAL TRADE COMMISSION 4 (1964); see Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1035 (1956).

93. NADER REPORT, *supra* note 9, at 57-58, 61.

94. *Id.* at 64-65.

95. Posner, *supra* note 78, at 86-87; see HENDERSON, *supra* note 77, at 174-75. But, says Elman, when the FTC does take a stand against a large industry, "the agency will stand naked and alone when it takes a controversial action impinging on powerful private interests, as the Federal Trade Commission discovered when it promulgated its cigarette labeling rule in 1964." Elman, *supra* note 78, at 1047.

96. ABA REPORT, *supra* note 78, at 37.

97. Elman, *supra* note 78, at 1045.

tection are least protected.⁹⁸ Consumers, especially the poor, are not aware of the FTC;⁹⁹ nor is the FTC always cognizant of the consumer's problems.¹⁰⁰ Because many of the FTC officials believe that the individual needs of the consumer should be protected by the state and local agencies, they often decline to exercise the FTC's power.¹⁰¹ However, as explained above, the states with their inadequate legislation and general inability to regulate consumer fraud also fail to adequately protect the consumer.

The Kerner Report emphasized that current laws are not designed to protect the rights of most low-income consumers.¹⁰² Indeed, it has been concluded that the collective exploitation of consumers contributed greatly "to the sense of alienation, tension and frustration that made rioting and civil unrest a stark reality in our cities."¹⁰³ Clearly, new remedies are necessary, and it is submitted that a private right of action under section 5 of the FTC would enable the consumer to redress many of his grievances.

Private Litigation Under Section 5

A consumer seeking to invoke the protection of section 5 of the FTCA would be confronted with two threshold questions: (1) Do the federal courts have jurisdiction over the consumer's claim? (2) Would a private litigant have standing to sue under a statute which is silent concerning the right of an individual to seek relief under it?

A. Jurisdiction

A federal court would have jurisdiction over a claim for private relief under section 5 of the FTCA. Section 1337 of title 28, United States Code, provides:

The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

In *United States v. Basic Products Co.*¹⁰⁴ the court indicated that Congress enacted the FTCA under the exercise of its constitutional power

98. See Baum, *The Federal Trade Commission and the War on Poverty*, 14 U.C.L.A.L. REV. 1071 (1967) [hereinafter cited as Baum].

99. *Id.* at 1073.

100. NADER REPORT, *supra* note 9, at 164.

101. See Baum, *supra* note 98, at 1073. See also Baum, *The Consumer and the Federal Trade Commission*, 44 J. URBAN L. 71 (1966).

102. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 274-77 (N.Y. Times ed. 1968).

103. Kass, S. 2589 and the Uniform Consumer Credit Code: A Comparison of Consumer Protection, 37 GEO. WASH. L. REV. 1131 (1969).

104. 260 F. 472 (W.D. Pa. 1919).

to regulate interstate and foreign commerce. Thus, it is clear that there is subject matter jurisdiction. Moreover, this statute does not require a minimum amount in controversy to invoke federal jurisdiction.^{104a} As a result, consumers will not be precluded from suing under section 5 because their damages total less than \$10,000.^{104b}

That the FTCA nowhere mentions a private remedy for damages should not deprive a federal court of jurisdiction. In *Bell v. Hood*,¹⁰⁵ for example, the plaintiff claimed damages for a violation of his rights under the Fourth and Fifth amendments. Although neither the Constitution nor Congress had provided for this type of remedy, the Court held that there was federal jurisdiction over the cause of action.¹⁰⁶ The Court added that the only prerequisite for federal jurisdiction is that the complaint seek recovery under the Constitution or laws of the United States.¹⁰⁷ Thus, an action brought under section 5—a law of the United States—would confer jurisdiction on the federal district court. Whether the complaint states a cause of action on which relief can be granted is a question of law which would be decided after the court assumes jurisdiction.¹⁰⁸

B. Standing

Once the court asserts subject-matter jurisdiction, it would then be asked to hold that the plaintiff-consumer has standing to sue under a statute which merely provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are unlawful." A consumer's claim for relief under this statute would come within both the framework of the "case or controversy" requirement of the United States Constitution, and the criteria for standing established by recent decision of the United States Supreme Court.

The modern federal concept of standing has been primarily developed in the cases of *Baker v. Carr*,¹⁰⁹ *Flast v. Cohen*¹¹⁰ and, most recently, *Association of Data Processing Service Organizations, Inc. v. Camp*.¹¹¹ In *Baker v. Carr*¹¹² the Court held, *inter alia*, that voters had

104a. *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375 (8th Cir. 1970).

104b. To invoke the jurisdiction of the federal court over cases involving federal questions or diversity of citizenship, the plaintiff must allege that the amount in controversy exceeds \$10,000. 28 U.S.C. §§ 1331-32 (1964).

105. 327 U.S. 678 (1946).

106. *Id.* at 681-82.

107. *Id.*

108. *Id.* at 682.

109. 369 U.S. 186 (1962).

110. 392 U.S. 83 (1968).

111. 397 U.S. 150 (1970). A companion case decided the same day is *Barlow v. Collins*, 397 U.S. 159 (1970).

112. 369 U.S. 186 (1962).

standing to claim that the malapportionment of their state legislatures violated the equal protection clause of the 14th amendment. The Court said the crux of standing is whether "appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." ¹¹³ and whether "[they] seek relief in order to protect or vindicate an interest of their own, and of those similarly situated."¹¹⁴ In *Flast v. Cohen*¹¹⁵ the Court used language as general as that in *Baker*. The Court, holding that a taxpayer had standing to attack the constitutionality of a federal statute on the ground that it violated the establishment and free exercise clause of the first amendment,¹¹⁶ declared:

Thus in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.¹¹⁷

In *Association of Data Processing Service Organizations, Inc. v. Camp*,¹¹⁸ decided in 1970, the Court posited the following criteria to determine standing in federal courts: (1) Has the plaintiff alleged that the challenged action caused him injury, economic or otherwise?¹¹⁹ (2) Is the interest sought to be protected by the complainant arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?¹²⁰

Although the case concerned standing to appeal the order of an administrative agency, the test established is capable of general application.¹²¹ This same test would apparently be as applicable to a consumer seeking a private right of action under the FTCA. Under these criteria, it is clear that a consumer would have standing to sue, for he

113. *Id.* at 204.

114. *Id.* at 207.

115. 392 U.S. 83 (1968).

116. *Id.* at 85.

117. *Id.* at 101.

118. 397 U.S. 150 (1970).

119. *Id.* at 152.

120. *Id.* at 153.

121. In *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970), for example, the plaintiff, arguing that he had standing to sue under the Securities Exchange Act of 1934, 15 U.S.C. 78a-78jj (1964), used the *Data Processing* test. In the course of its opinion, the court said: "In the context of a plaintiff seeking to invoke a remedy afforded by section 10(b) of the Exchange Act and Rule 10b-5, '[t]he first question is whether the plaintiff alleges that the challenged [conduct] has caused him injury in fact, economic or otherwise. . . .' The second question is whether 'the interest sought to be protected by the complaint is arguably within the zone of interests to be protected' by section 10(b) and Rule 10b-5." *Id.* at 805. The court in *Herpich* quoting *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).

would be faithfully and accurately alleging both that: (1) the unfair or deceptive act or practice had caused him injury in fact, economic or otherwise; and (2) he was within the "zone of interests" to be protected within the meaning of the FTCA.

C. Right to Sue Where a Statute is Silent

Although the FTCA does not specifically create a right of private action and previous decisions have found that only the FTC can institute a proceeding under section 5, there is ample analogous precedent for a federal court to hold that consumers can bring an action for private relief under the act. Many federal statutes which neither confer nor deny the right to bring a private action have been judicially interpreted to grant this right to members of a class which the statute was intended to protect.

In 1916, for example, it was held a private party may bring an action under the Safety Appliance Acts,¹²² which provided only for penal sanctions.¹²³ In *Texas & Pacific Railway Co. v. Ringsby*¹²⁴ the Court allowed an employee to recover for an injury caused by a defective handhold on a railroad car.¹²⁵ The Court said that, although the acts included no right of private relief

the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted.¹²⁶

The Court added that violation of the statute had resulted "in damage to one of the class for whose especial benefit the statute was enacted."¹²⁷ The Court then applied the common law rule that such a statute implied a private remedy.¹²⁸

This rationale has been followed in the cases in which the statute, in effect, imposed a duty upon the defendant. If a breach of that duty has injured one of the class to be protected by the statute, courts will permit a private action. *Reitmeister v. Reitmeister*,¹²⁹ in which senders of telegraphic messages brought suit under the Communications Act,¹³⁰

122. 45 U.S.C. §§ 8-10 (1964).

123. *Id.* § 13.

124. 241 U.S. 33 (1916).

125. *Id.* at 36.

126. *Id.* at 39.

127. *Id.*

128. "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C.J. Anon., 6 Mod. 26, 27.)" *Id.* at 39.

129. 162 F. 691, 694 (2d Cir. 1947).

130. 47 U.S.C. § 605 (1964).

and *Fitzgerald v. Pan American World Airways, Inc.*,¹³¹ wherein passengers of air carriers sought recovery under the Civil Aeronautics Act,¹³² affirmed judgments for the plaintiffs even though the acts did not provide for damages. In both cases, the plaintiff were members of a class protected by the relevant statute. Both courts held that, in the absence of a contrary implication, a statute enacted for the protection of a specified class should also be construed to permit a private remedy.

In *Wyandotte Transportation Co. v. United States*¹³³ the Supreme Court held that section 15 of the Rivers and Harbors Act of 1899,¹³⁴ which prohibited the voluntary or negligent sinking of a vessel, permitted the government to recover the cost of removing the sunken ship, although the act provided only for penal sanctions.¹³⁵ The Court said:

We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act. We think we correctly divine the congressional intent in inferring the availability of that remedy from the prohibition of § 15.¹³⁶

In *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*¹³⁷ the Court held that the Railway Labor Act¹³⁸ granted a railway employee the right to sue the defendant Brotherhood for its failure to represent all employees in the craft without regard to race. The Court found that the federal statute, which permitted a majority of employees of a particular class to select an organization for representation¹³⁹ condemned the Brotherhood's conduct.¹⁴⁰ The Court then stated:

The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it had adopted.¹⁴¹

Thus, although the courts determine the extent to which the statute

131. 229 F.2d 499, 501 (2d Cir. 1956).

132. Civil Aeronautics Act, ch. 601, §§ 404, 902, 52 Stat. 993, 1015 (1938), as amended, 49 U.S.C. §§ 1374(b), 1472(a) (1964), formerly 49 U.S.C. §§ 484(b) 622(a).

133. 389 U.S. 191 (1967).

134. 33 U.S.C. § 409 (1964).

135. *Id.*

136. 389 U.S. at 204.

137. 323 U.S. 210 (1944).

138. 45 U.S.C. §§ 151-88 (1964).

139. *Switchmen's Union of N. America v. National Mediation Bd.*, 135 F.2d 785, 796 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

140. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944).

141. *Id.*, quoting *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940).

was to be implemented, their decisions must give effect to the congressional intent of providing protection to a particular class. Applying this rule to the construction of section 5, courts should attempt to carry out the intent of Congress, which was to protect the large consumer class by imposing a duty of those engaged in commerce to refrain from unfair or deceptive acts or practices in commerce.¹⁴² The above cases suggest that a breach of this duty to consumers should render the violator civilly liable to a member of the protected class.

Permission of a private remedy would also result in a more systematic enforcement of the act. In *J.I. Case Co. v. Borak*¹⁴³ the Supreme Court held that the purpose of section 14(a) of the Securities Exchange Act of 1934¹⁴⁴ was "to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation."¹⁴⁵ The petitioner, J.I. Case Co., emphasized that Congress had made no specific reference to a private action under the Securities Exchange Act.¹⁴⁶ The Court said, however, that "broad remedial purposes are evidenced in the language"¹⁴⁷ of section 14(a). After holding that shareholders of the petitioner's company had a right to sue for damages under section 27 of the act¹⁴⁸ for a violation of section 14, the Court, using language that could be applied to section 5 of the FTCA, declared:

While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

. . . The damage suffered results not from the deceit practiced on him [the investor] alone but rather from the deceit practiced on the stockholders as a group. . . . Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in anti-trust treble damage litigation, the possibility of civil dam-

142. 15 U.S.C. § 45(a)(1) (1964).

143. 377 U.S. 426 (1964).

144. 15 U.S.C. § 78n(a) (1964) states: "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title."

145. 377 U.S. at 431. In *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2d Cir. 1951), the court said that, although section 10(b) of the Securities Exchange Act did not explicitly authorize a civil remedy, "[s]ince . . . it does make 'unlawful' the conduct it describes, it creates such a remedy." See also *Herpich v. Wallace*, 430 F.2d 792 (5th Cir. 1970).

146. 377 U.S. at 431.

147. *Id.* at 431-32.

148. 15 U.S.C. § 78aa (1964).

ages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirement. . . .

We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.¹⁴⁹

Private enforcement of the FTCA deceptive trade practices could supplement the commission's attempt to provide effective protection. The right of consumers to institute private actions would be an effective weapon to combat unfair or deceptive acts or practices in commerce.

As a further example, in *Allen v. State Board of Elections*,¹⁵⁰ the Supreme Court held that private parties could sue in the federal court¹⁵¹ to have new state voting laws declared unenforceable under the Voting Rights Act of 1965.¹⁵² The Voting Rights Act did not explicitly grant private parties the right to bring an action, but the Court stated:

The achievement of the Act's laudable goals could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.

. . . The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. . . .

. . . The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove to be an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.¹⁵³

The federal judiciary has failed to realize, however, that section 5 of the FTCA can be effectively enforced only by private litigants. The FTC, with its limited staff, is presently unable to regulate the complex field of consumer fraud. Thus, just as a denial of a private action under the Voting Rights Act would render it less effectual, a continued denial of a private remedy under section 5 makes the entire act an "empty promise" for the consumer.

Finally, in *Goldstein v. Groesbeck*,¹⁵⁴ the court of appeals granted private relief under the Public Utility Holding Company Act of 1935,¹⁵⁵ holding:

149. 377 U.S. at 432-33.

150. 393 U.S. 544 (1969).

151. "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343 (1964).

152. 42 U.S.C. §§ 1971-73 (Supp. III, 1967).

153. *Allen v. State Board of Elections*, 393 U.S. 544, 556-57 (1969).

154. 142 F.2d 422 (2d Cir. 1944).

155. 15 U.S.C. §§ 79-79z-6 (1964).

[W]e think a denial of a private right of action to those for whose ultimate protection the legislation is intended leaves legislation highly publicized as in the public interest in fact sadly wanting, and even delusive, to that end.¹⁵⁶

The protection offered by the FTCA, although described in the "interest of the public,"¹⁵⁷ in fact provides no meaningful consumer protection. A denial of a private right of action leaves the protection afforded by the FTCA largely illusory. The paradoxical result is that the FTCA can protect the public only if private parties can bring actions under section 5.

Advantages of a Private Right of Action

Numerous consumer advocates have agreed that a private right of action would best serve the interest of the consumer. Private actions are especially effective against deceptive acts or practices that endanger health or safety when recovery of large damages is possible.¹⁵⁸ Without a private remedy, the consumer may not be able to obtain relief.¹⁵⁹

Phillip Elman, an FTC Commissioner for two terms, maintains that:

When only private interests are aggrieved, the proper remedy is private action in the courts. A tort, whether the victim is a competitor or a consumer, is a private, not a public wrong—and the place to seek relief is in a court, not a regulatory agency. . . . Just as the administrative process should not be used to insulate businessmen from the rigors of a free enterprise economy, it should not be used to relieve the courts of their duty to redress violations of private rights.¹⁶⁰

The *Harvard Journal of Legislation* recommended a private right of action under a statute modeled after section 5 of the FTCA, arguing it was both more economical and more effective to encourage the consumer to seek private redress¹⁶¹ and adding further:

By allowing the aggrieved consumer to take legal action to obtain

156. 142 F.2d at 427.

157. 15 U.S.C. § 45(b) (1964).

158. Posner, *supra* note 78, at 65; see Comment, *Public and Private Consumer Protection in New York*, 34 ALBANY L. REV. 326, 331 (1970).

159. Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559, 607 (1968) [hereinafter cited as Rice]. Compare Kripke, *Gestures and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 46 (1969), where the author says: "The state cannot undertake to represent private parties in individual litigation, and the knowledge of this sometimes makes the state an apparently less successful informal mediator than a nonpublic spokesman. . . ."

This and the absence of assured vigorous public enforcement leave and will always leave a continuing need for private enforcement."

160. Elman, *supra* note 78, at 1046.

161. *An Act To Prohibit Unfair and Deceptive Trade Practices*, 7 HARV. J. LEGIS. 122, 147 (1969).

convenient and speedy redress, Part D [private legal recourse] avoids either (1) creating a "bottleneck" where only a limited number of consumers will get the protection they deserve or (2) forcing the expenditure of tax dollars for a larger attorney general's office to do much that the consumer, if given the opportunity, could do himself.¹⁶²

Finally, private consumer suits could, if successful, be used as leverage for obtaining voluntary compliance from offenders in the future.¹⁶³ Because of the fear of further litigation, it is likely the consumer would be successful in forcing the violator to comply with section 5. The FTC, of course, has not had such success.¹⁶⁴

Conclusion

The present interpretation of section 5 of the FTCA, permitting enforcement only by FTC action, does not give to the consumer the protection that Congress had intended to provide. It is evident that present state laws and agencies do not afford the consumer adequate relief from unfair or deceptive acts or practices in commerce. A uniform federal deceptive trade practices law is necessary to enable consumers to redress their grievances. Section 5 is a sufficiently broad statute to provide adequate protection for the consumer.¹⁶⁵ Its chief merit lies in its "extraordinarily flexible statutory grant . . . to deal with unfair or deceptive acts or practices."¹⁶⁶ Because it is a federal law, it can be used to combat consumer frauds that reach across state lines; in such situations, existing state and local laws are often ineffective.¹⁶⁷ Furthermore, there is ample case law that has given meaning to the broad phrases of the act.¹⁶⁸ At the same time, because the act is broadly worded, the litigant is not required to plead and prove all the elements of fraud or deceit.

Although it is true that the courts have denied a private right of action under section 5 in all cases, it is also true that they have not examined the question since the passage of the Wheeler-Lea Amendment, which manifested the intent of Congress to make the FTCA suf-

162. *Id.* at 147. The ABA Commission studying the FTC also felt some form of private relief for an injured consumer was a necessity to protect him from the varied instances of fraud. ABA REPORT, *supra* note 78, at 2.

163. Rice, *supra* note 159, at 606-07.

164. See text accompanying notes 92-94 *supra*.

165. See Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 MASS. L.Q. 307 (1969), in which the author outlines the advantages of a recently enacted statute modeled after section 5 but expressly providing for a private right of action.

166. ABA REPORT, *supra* note 78, at 52.

167. *Id.*

168. See note 62 *supra*; see Note, *Consumer Protection in North Carolina—The 1969 Legislation*, 48 N.C.L. REV. 896, 904-05 (1970).

ficiently broad to cover all possible injuries to the consumer.¹⁶⁹ It is important to note that

Congress wanted a phrase that carried no historical impediments, one that the courts could not impair by reading into it a historical gloss that would square it into a rigid, unyielding mold; it wanted an "elastic" term that, like those of the constitution itself, would embrace not merely trade practices known in 1914, but those yet to be discovered by future generations of "rogues."¹⁷⁰

The courts' present interpretation is forcing the FTCA into an unyielding mold. Paul Rand Dixon, former Chairman of the FTC, said of the original FTCA legislation:

[T]he draftsmen of the new legislation concluded that if the new policies were to be made fully effective, their administration had to be placed, at least in the first instance, in the hands of an impartial, nonpartisan body of men thoroughly experienced in the intricacies of commerce, with more flexible machinery at their disposal than the judicial system could offer.¹⁷¹

The FTC is not, however, a nonpartisan body.¹⁷² Nor are its administrators "thoroughly experienced in the intricacies of commerce." It can only be concluded that private consumers should be allowed to do for themselves what the FTC and other state agencies have not done: provide protection from those who would take advantage of the consumer's economic and political weakness to exploit him.

*Allan Bruce Currie**

169. See text accompanying notes 26-30 *supra*.

170. MacIntyre & Dixon, *The Federal Trade Commission after 50 Years*, 24 FED. BAR J. 377, 385 (1964).

171. *Id.* at 385.

172. See Elman, *supra* note 78, at 1046-47.

* Member, Second Year Class.